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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19 ....

No. [redacted] 144

LAURENCE TISCH, MRS. LAURENCE TISCH, ABRAHAM TISCH and MRS. SADIE B. TISCH,
Petitioners,

vs.

ABE ZABLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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vs.

ABE ZABLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

This Petition for Writ of Certiorari is being filed to review the Order of the United States Court of Appeals, Fifth Circuit, entered on the 14th day of May, 1959, dismissing an appeal commenced by your Petitioners which was an appeal from an Order entered by the United States District Court of the Southern District of Florida (See Tr. 16-20).

The jurisdiction of this Court is being invoked under the principles laid down in Rule 19, Supreme Court Rules, in that your Petitioners aver that the Order of the United States Court of Appeals, Fifth Circuit, entered on May 14, 1959 (Tr. 47), dismissing your Petitioners' appeal on the grounds that said Order appealed from was an Interlocutory Order is in conflict with the decision of this Court in the case of *Federal Trade Commission* v. *Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206, 73 Supreme Court Report

245 (1952) and with the decision of the United States Court of Appeals, Sixth Circuit, in the case of *Delta Drilling Co.* v. *Arnett*, 186 F.2d 481 (1950), in regard to the question of whether an order of a District Court is final and appealable or whether it is interlocutory in nature, and therefore, not appealable under the Federal Statutes. Your Petitioners further state that as is reflected in the Opinion of this Court in the *Federal Trade Commission* v. *Minneapolis-Honeywell* case, *supra*, and in the *Delta Drilling Co.* v. *Arnett* case, *supra*, that there is great confusion existing among the bench and bar regarding this question of when and under what circumstances an order is final for appeal purposes and when it is not, and that because of this confusion appellate practice in the Federal courts has become not a contest on the merits of the litigation involved but a guessing game as to when the losing party should appeal. If said party guesses wrong the results are disastrous to him. For the above reasons this Honorable Court should take jurisdiction of this certiorari and solidify the rules which can be followed and understood by the members of the bench and bar throughout the Country on the question of the finality of an order for appeal purposes.

The question presented specifically by this Petition for Writ of Certiorari is whether or not the order entered by the United States District Court for the Southern District of Florida under date of March 16, 1959, is a final order under the statutes of the United States from which your Petitioners are entitled to prosecute an appeal to the United States Court of Appeals, Fifth Circuit.

This cause was originally commenced in the United States District Court for the Southern District of Florida by Abe Zable filing suit against the Petitioners herein seeking to establish an alleged joint venture in the owner-

ship and operation of the Ambassador Hotel located in Atlantic City, New Jersey, and seeking an accounting and damages against the Petitioners based upon the profits realized in the operation and sale of the Ambassador Hotel in Atlantic City, New Jersey. The jurisdiction of the United States District Court in the first instance was invoked based upon the diversity of citizenship existing between the Plaintiff, Zable, and the Defendants, Tisches, and the jurisdictional amount of the Court.

The Respondent herein, Zable's, Complaint in the District Court was filed in June of 1957 in which he claimed by reason of a letter which was attached to his Complaint and dated February 20, 1950, that he and the Defendants had entered into a joint venture to procure and operate the Ambassador Hotel in Atlantic City, New Jersey. The letter stated that if Mr. Zable was successful in negotiating a lease of the Ambassador Hotel for the Tisches from a Mr. John McShane that Mr. Zable would be entitled to a twenty-five (25%) per cent interest in the resulting enterprise. The letter on its face reflected that said agreement would automatically terminate on May 1, 1950, unless extended by mutual agreement of the parties. The Complaint further alleged that in October of 1951, the Defendants through the media of The Ambassador of Atlantic City, Inc., a New Jersey corporation, had leased the Ambassador Hotel and had operated the hotel from then until December of 1956. Zable further alleged that the Defendants, Tisches, had fraudulently misrepresented to him that there had been no profits from the operation of the hotel during the time they operated it and that it was not until shortly prior to the filing of the suit in 1957 that he found that there had been profits made. The prayers of the Complaint were to establish the joint venture and to

require Defendants to account to the Plaintiff for the profits in the operation of the hotel. The Ambassador of Atlantic City, Inc., a New Jersey corporation, was not a party defendant to the cause (See Tr. 3-10).

The Answer of the Defendants denied any joint venture, denied that the letter of February 20, 1950, had ever been extended beyond its terminal date, denied that Zable was entitled to any accounting from the Defendants for the operation or sale of the Ambassador Hotel in Atlantic City, and denied that there had been any fraud or misrepresentation by the Defendants to the Plaintiff. The Answer also pleaded the affirmative defenses of the Statute of Limitations, Statute of Frauds, laches, and estoppel (See Tr. 10-16).

After a trial of the matter, the United States District Court entered its Order deciding that a joint venture had existed between Zable and your Petitioners, Tisches, ordering a dissolution of the joint venture, and ordering an accounting between the parties, and referring the matter to a special master for the purposes of an accounting. The District Court made no finding that the Tisches had been in any way guilty of fraud or misrepresentation (See Tr. 16-20).

It is the contention of your Petitioners that the Order of the United States District Court in this cause establishing that there was a joint venture between the parties and that the Plaintiff, Zable, was entitled to twenty-five (25%) per cent of the profits in the operation of the Ambassador Hotel and was entitled to twenty-five (25%) per cent of the profits of the sales price of the hotel and ordering a dissolution of this joint venture, is a final order under the provisions of Title 28, Section 1291, U.S.C.A., and that the United States Court of Appeals, Fifth Circuit, was in error

in dismissing the appeal on the grounds that the order was interlocutory and not a final appealable order under the applicable United States Statutes.

The strict technical construction of the term final judgment or final decree as defined in the United States Statute as the only time that an appeal is allowable to the Appellate Courts of the United States was long ago departed from by this Court in the case of *Forgay* v. *Conrad*, 6 Howell (47 U.S.) 201, 12 Law Edition 404, in which this Court stated:

> "The question upon the motion to dismiss is whether this is a final decree within the meaning of the Acts of Congress. Undoubtedly it is not final in the strict technical sense of that term, but this Court has not heretofore understood the words, 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction and one more consistent to the intention of the legislature."

The reasoning of the cases holding that in an accounting suit the order establishing liability is purely interlocutory is without logic or foundation. There is no more connection between the part of the case in which the liability of the Defendants is determined and the portion of the case where an accounting is had than there is between night and day. This Court as well as many other Federal and State Courts has long ago established that a Plaintiff in a suit claiming an accounting from the Defendants is not entitled to inquire into the accounting phase of the litigation until his right to the accounting has been proven and ultimately determined, for as was stated by Mr. Justice Cardozo in delivering the Opinion of this Court in the case of *Sinclair Refining Co.* v. *Jenkins Petroleum P. Co.*, 289 U.S. 689, 53 S. Ct. 730:

> "To state the function of the remedy is to give the password to its use. There are times when a suit is triable in separate parts, one affecting the right or liability, and the other affecting the measure of recovery. In suits of that order a discovery as to damages will commonly be postponed till the right or liability has been established or declared. Schrieber v. Heyman, 63 L.J. Rep. 749 (1894); Elkin v. Clarke, 21 W.R. 447 (1873); Parket v. Wells, L.R. 18 Ch. Div. 477; Fennessy v. Clark, L.R. 37 Ch. Div. 184; De la Rue v. Dickinson, 3 K. & J. 388; Peile, The Law and Practice of Discovery, pp. 26-29; Bray, Principles and Practice of Discovery, pp. 14, 15; Wigram, Points in the Law of Discovery, Par. 45. As a general thing it will be useless to decree it any earlier, and may even be oppressive. 'The principle of Judicial parsimony' (L. Hand, J., in Pressed Steel Car Co. v. Union Pacific Railroad Co., supra), if nothing more, condemns a useless remedy. This division of the trial into stages or installments will happen oftenest in suits in equity, though it is not unknown in actions at law where a jury has been waived. In equity it is common practice. Thus, a suit to establish a partnership or to restrain the infringement of a patent culminates, if successful, in an interlocutory decree, which will be followed by an accounting and a discovery of documents. In these and like cases, the accounts will not be probed until the right has been adjudged."

Why then, if this is the iron-clad rule in the trial courts, is the rule and the logic thereof suddenly departed from when it comes to the Appellate jurisdiction? Why put the litigants to the time, trouble, and expense of a long, drawn out, and costly accounting proceeding which, if the losing party wishes to appeal they have to print the record of not only the liability aspects but the accounting aspects of the case, and then have the Appellate Court reverse the case on the grounds that no liability was proven and never touch the accounting phase? Some of the decisions

that have decided that such orders are not appealable do it on the basis that the lower court still maintains jurisdiction over the cause and could in the future after the accounting enter an order changing the whole circumstances of its original order. Are we so naive to believe or are we to assume that the Federal trial judges are so incompetent that they will in one phase of the proceedings establish liability and then after an accounting has been taken reverse themselves and say that there was no liability? This would be rather a ludicrous situation to say the least.

This Court recently in the case of *Federal Trade Commission* v. *Minncapolis-Honeywell Reg. Co., supra,* has realized the confusion and doubt that exists in the minds of the bar regarding this term "final order or final decree" from which an appeal must be prosecuted. This was a certiorari by the Feberal Trade Commission from an order of the United States Court of Appeals seeking to review two orders of that Court. One was issued on July 5, 1951, and the second, which was termed Final Decree, was issued on September 18, 1951. Question was raised in the Supreme Court as to the jurisdiction of the Court to review the Order of July 5, 1951, along with the Order of September 18, 1951. The Supreme Court of the United States in dismissing the certiorari as to the order of July 5, 1951, because the Trade Commission had not taken certiorari within the time prescribed, discussed the rule of finality and stated:

> "The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."

The Court went on to state that even though the Court of Appeals in the order of September 18th reiterated everything that it had stated in the July 5th order it would not change anything and that there was only one controversy between the parties which related only to the matters which were adjudicated on July 5th. The Court went on to discuss the question of the Court of Appeals using a final decree in its second order and said that this was not at all controlling in the case and it was the merits of the order itself not what it was termed that decided the question. The Supreme Court stated about the Order of July 5th and we quote:

"It was neither tentative, informal or incomplete."

The Court went on to state:

"Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end."

Mr. Justice Black in a dissenting Opinion made a very salient statement:

"But in arguing over 'finality' we should not ignore the fact that Congress has declared that this type of proceeding should be reviewable both in the Court of Appeals and here. We frustrate that declaration when review is denied a litigant because of his failure to guess right when confronted in August, 1951, with a puzzle, the answer to which no one could know until today.

"In prior cases cited in the Court's opinion this Court has found ways to grant review to *litigants bedeviled and confused by the judicially created fog of 'finality'*. In those prior cases the Court recognized

the vagueness of the finality rule and refused to throw out of court litigants who had acted bona fide." (Emphasis added).

If the decision in the Federal Trade Commission case is the law of this Country, then the decision of the United States Court of Appeals, Fifth Circuit, in this cause in dismissing the appeal of your Petitioners is error because it is obvious that the District Court in the ultimate, final order it may enter in this cause is certainly not going to disturb the findings that it has already made in the order of March 16, 1959, in regard to liability. The same thing that happened in the Federal Trade Commission case could happen in this case, that is your Petitioners relying on the decision of the Fifth Circuit dismissing their appeal and this Court in a later proceeding, when the ultimate appeal is perfected, reversing the Fifth Circuit on the grounds that this order of March 16, 1959, was in actuality a final order and reviewable as was the decision in the Federal Trade case.

The case of *Delta Drilling Co.* v. *Arnett*, 186 F.2d 481; U.S. Ct. of App., Sixth Circuit, 1950, is another case which your Petitioners believe is factually similar to the case of your Petitioners, and the decision in the Delta Drilling Co. case is contrary to the decision reached by the United States Court of Appeals, Fifth Circuit, in this case. The Delta Drilling Co. case was a suit in the nature of quiet title and accounting. The facts were that a Mr. Thomas E. Arnett owned certain land in Kentucky. In 1915 Thomas E. Arnett mortgaged the lands but reserved to himself in the mortgage the oil and mining rights under the land. In 1916 the mortgage was foreclosed and thereafter through the purchasers at the foreclosure sale the fee simple title to the land came then to a Mr. and Mrs. Brockett who were also defendants in this cause of action. Some-

time after the foreclosure sale the purchaser at the foreclosure and the Bracketts executed oil and gas leases to Sinclair Oil Co. Sinclair assigned a fractional working interest to Delta Drilling Co. and other people. In 1947 five producing oil wells were brought in on the subject property, and thereafter Thomas E. Arnett brought suit to quiet his title to the oil and gas rights in the property as against these defendants, sought an injunction from further drilling on the land and an accounting of the profits and royalties realized from all the oil and gas extracted, produced and sold from the oil and gas on the land. The District Court entered a judgment in favor of the Plaintiff quieting his title to the oil and gas and mineral rights in the property and cancelling the subsequent oil and gas leases that had been made by the purchasers at the foreclosure sale and their successors in title. The judgment entered by the District Court on November 22, 1948, was denominated on the order as "interlocutory order and judgment". In the order of the District Court the District Court stated after ruling that his title was quieted and that the Plaintiff was the actual owner of the oil and gas involved, that the Defendants make and render to the Plaintiff a full and complete accounting within twenty (20) days of the date hereof of all oil, gas and other petroleum products extracted from said land and sold by them so that the court can determine therefrom the issues as to the amount of damages, if any, that should be awarded to the Plaintiff. The judgment further stated that the cause should continue "on the undisposed of issues herein". The Defendant, Delta Drilling Co. and the other Defendants claiming title from the purchasers at the foreclosure sale, did not appeal from this order of the District Court. In September of 1949, a final judgment was entered in the cause wherein in this last judgment the Court reiterated

the holding that the Plaintiff was the owner of the legal title to the oil and gas rights and cancelled the oil and gas leases and rendered judgment against the defendants on the accounting feature of the case. Thereafter the defendants, Delta Drilling Co. and other defendants, instituted an appeal from this second judgment, and among the questions to be argued on appeal the appellants had raised the original ruling of the court in November of 1948, wherein it was first found by the District Court that the plaintiff was entitled to oil and gas but retaining jurisdiction of the matter for the purposes of accounting. The appellee, Arnett moved to dismiss the appeal that was seeking to reverse the lower court on its decision regarding the quieting of the title of the plaintiff on the grounds that the Appellate Court had no jurisdiction to pass on the subject because of the fact the Appellants have not taken an appeal from the first judgment and had waited until the final order had been entered before appealing, and that the time had therefore expired on the first phase of the case. The United States Court of Appeals in this case ruled as follows:

> "The judgment of November 22, 1948, was denominated "Interlocutory Order and Judgment,' but its finality is to be determined not by its name, but by the question whether it disposes of the case upon its merits. Jacobsen v. Jacobsen, 75 U.S. App. D.C. 223, 126 F.2d 13; Biggins v. Oltmer Iron Works, 7 Cir., 154 F.2d 214. Cf. City of Louisa v. Levi, 6 Cir., 140 F.2d 512. Defendants contend that the District Court and the parties considered the first judgment as purely interlocutory and non-appealable; but this circumstance plainly is not controlling. Raytheon Mfg. Co. v. Radio Corp. of America, 1 Cir., 76 F.2d 943, affirmed 296 U.S. 459, 56 S. Ct. 297, 80 L. Ed. 327.
>
> "We think the judgment of November 22, 1948, is clearly final. It is true that the judgment grants four

defendants leave to file answers, but these were to relate to the question whether the defendants had acted innocently in drilling for the oil. The question of title to the equipment was left open; but this also is incidental to the accounting.

"With reference to the main question of title to the minerals, the judgment of November 22, 1948, declared that the plaintiff 'is now and has been since January 7, 1915, the owner and is entitled to possession of the oil and gas' in and under the land described, and ordered that his title to such minerals 'be and the same is hereby quieted against all claims, demands, and pretensions of the defendants, and each of them with respect thereto.' It was also adjudged that the plaintiff 'is entitled to all of the oil or gas wells now located on the above described tract of land,' and that the defendants 'make and render to the plaintiff a full and complete accounting within 20 days of the date hereof of all oil, gas and other petroleum products' extracted from such land by them, and sold, 'so that the court can determine therefrom the issues as to the amount of damages, if any, that should be awarded to the plaintiff herein.' The judgment further ordered that the case be 'continued on the undisposed of issues herein.' This was a judgment which was 'complete and required nothing from the later one to give it finality.' Kycoga Land Co. v. Kentucky River Coal Corp., 6 Cir., 110 F.2d 894. Failure to appeal therefrom was therefore fatal, Gulf Refining Co. v. United States, 269 U.S. 125, 46 S. Ct. 52, 70 L. Ed. 195, to the case of the defendants of record on November 22, 1948, so far as it related to the issue of quieting title."

Let us analyze the Delta Drilling Co. case with the facts in this case. In this case the plaintiff, Zable, claimed a twenty-five per cent interest in the operation of the Ambassador Hotel in Atlantic City alleging that he had entered into a joint venture with the defendants. The

District Court has held in its order that there was a joint venture entered into, that the plaintiff, Zable, is entitled to twenty-five per cent interest of the profits thereof, and has ordered a dissolution of the joint venture. The District Court has referred the matter to a master solely for the purpose of ascertaining the quantum of the profits involved in the matter. As was stated in the Delta Drilling Co. case this judgment insofar as the matters it passes upon is complete and requires nothing from the later judgment which may be entered in this cause to give this order finality.

If the decisions in the Federal Trade Commission case and the Delta Drilling Co. case are the law of this Country then most certainly the decision of the Fifth Circuit in dismissing your Petitioners' appeal is in conflict therewith. The burden should not be placed upon your Petitioners herein to ascertain at a later date, as happened to the Petitioners in the Delta Drilling Co. case and the Federal Trade Commission case, that the order of the District Judge of March 16, 1959, was appealable and we are therefore barred from raising any questions regarding liability. This seems, as was stated by Mr. Justice Black, to be rather a severe penalty to place upon appellate lawyers, that are having to guess in advance what this Court will do in the future. A wrong guess by a counsel of course seriously affects hi legal reputation, but of more importance, it destroys his client's rights without ever having been heard which in itself destroys the very basic concept of our jurisprudence and that is that every man is entitled to his day in court. There can be no logical reason advanced as to why the order in this cause establishing the liability of the parties is not final and appealable. Before parties to litigations such as this are put to the additional time and expense of an accounting it would seem to be axiomatic

that they ought to know from the highest appellate court whether or not there is any basic liability at all. Courts have never required the doing of useless acts. It is respectfully submitted that this question of finality and appealability of orders has over the years and the decisions become more and more confused and confusing and that this Court should either follow the reasoning of the Delta Drilling Co. case and the Federal Trade Commission case and the reasoning of Justice Cardozo in the Sinclair Refining Co. case or this Court should adopt the rule as has been adopted in this case by the Fifth Circuit Court of Appeals in granting the Motion to Dismiss the appeal and re-adopt the ancient rules of the Court that no order in any case is appealable until all judicial labors have come to an end in the trial court.

Let's not make the reputation of appellate attorneys depend upon their ability to guess correctly, but let it be determined upon their ability, period.

Respectfully submitted,

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